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No. 93-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS and DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, and AGRI-FINANCE, INC.,

Petitioners,

v.

KOFKOFF EGG FARM LIMITED PARTNERSHIP, SAMUEL KOFKOFF, ROBERT KOFKOFF, JOSEPH FORTIN, BLAIR HAGY, COLCHESTER FOODS, INC., PIERCE HOLLOW FARMS, FITCHVILLE REALTY, INC., THE CONNECTICUT NATIONAL BANK, NORWICH SAVINGS SOCIETY, BROWN, JACOBSON, JEWETT & LAUDONE, P.C. n.k.a. BROWN, JACOBSON, TILLINGHAST, LAHAN & KING, P.C., MILTON JACOBSON, and GLENN GORDON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS RESTATED

1. Whether a conflict exists as to the appropriate standard of review when determining if an amended complaint should be allowed.
2. Whether the Federal Rules of Civil Procedure apply to a state court complaint removed to federal court.
3. Whether the Second Circuit properly applied *Reves v. Ernst & Young*.
4. Whether bankers are exempt from RICO.
5. Whether the Second Circuit properly found that the petitioners failed to allege the requisite predicate acts under RICO.
6. Whether there is a national debate regarding the threat to enforce legal or contractual rights as the basis for Hobbs Act violations.
7. Whether enforcement of legal or contractual rights constitutes acquisition or maintenance of an interest in, or control of, a borrower's business.
8. Whether the Second Circuit limited its review of petitioners' claims.
9. Whether the Second Circuit properly denied petitioners' request for additional discovery prior to granting summary judgment.

STATEMENT REQUIRED BY RULE 29.1

Respondent, The Connecticut National Bank n/k/a Shawmut Bank Connecticut, N.A., discloses that it is a subsidiary of Shawmut National Corporation, a publicly held corporation that does not have any other corporate parents, subsidiaries, or affiliates which are publicly held.

Respondent, The Norwich Savings Society, is a wholly-owned subsidiary of Norwich Financial Corporation, a registered bank holding company.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

A. Counterstatement

Petitioners seek review of an unpublished unanimous decision of the Second Circuit Court of Appeals [1] affirm-

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[1] Kearse, C.J., Miner, J., and Pratt, J. (Pet. App. 1).

ing the District Court's [2] fact-specific holding that petitioners' complaint failed to state a claim under the Racketeer Influenced And Corrupt Organization Act (hereinafter "RICO"), 18 U.S.C. § 1962, *et seq.*[3] Despite petitioners' attempt to characterize the Appellate Court's opinion to the contrary, this case does not fulfill any requirement of Supreme Court Rule 10 and does not merit consideration by this Court.

Although respondents vigorously object to petitioners' numerous mischaracterizations of the "facts" in this case, a full discussion of petitioners' use of creative license here would far exceed the scope of this brief. However, respondents are compelled to highlight several glaring misstatements of fact. Specifically, the following statements were never plead below, that: respondent CNB embezzled or converted funds (Pet. 6); respondent Norwich controlled petitioners' enterprises' liquidation (Pet. 7); respondents acquired all of the petitioners' assets (Pet. 7); and, petitioners were solvent and had more than enough assets to pay all of their obligations to Kofkoff, CNB, and Norwich. (Pet. 7).[4]

B. History of the Case

Petitioners in this matter, plaintiffs in the original District Court action, Julius Rytman, Dora Rytman, Colchester Egg Farms, Inc., Rytman Grain, Inc., Julius and Dora Rytman Proprietorship, Pinecrest Duck Farm Trust, and Agri-Finance, Inc. (hereinafter "Rytmans") have requested certiorari in response to the decision of the

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[2] Dorsey, J. (D. Conn.).

[3] *Ruling on Pending Motions*, August 31, 1992. (Pet. App. 13).

[4] It should be noted that despite the fact that both the District and Second Circuit Courts' decisions were based upon petitioners' November 2, 1991 Complaint, petitioners have neglected to include the complaint in their Appendix, instead Rytmans included their September 23, 1992 *proposed* amended complaint ". . . which the district court reviewed and concluded failed to cure the defects in the original complaint." (Pet. App. 7).

Second Circuit Court of Appeals (3-0) dated June 21, 1993 affirming the District Court's *Ruling on Pending Motions* dated August 31, 1992, dismissing Rytmans' RICO claims and granting Summary Judgment to Norwich. Additionally, Rytmans challenge the District Court's November 24, 1992 denial of their Request for Leave to Amend.

Petitioners' RICO complaint identifies thirteen (13) different entities who may be grouped as follows:

1. *Banking Institutions*—The Connecticut National Bank ("CNB") and The Norwich Savings Society ("Norwich");
2. *Attorneys*—Milton L. Jacobson, Esq., Glenn M. Gordon, Esq., and the law firm of Brown, Jacobson, Jewett & Laudone ("Brown Jacobson"); and
3. *Poultry Business Competitors*—Kofkoff Egg Farm Limited Partnership, Samuel Kofkoff, Robert Kofkoff, Joseph Fortin, Blair Hagy, Colchester Foods, Inc., Pierce Hollow Farms, and Fitchville Realty, Inc. ("Kofkoff").

Respondent CNB is a national banking association which began a lender/borrower relationship with Rytmans and their associated entities in the early 1960's and subsequently loaned millions of dollars to them. Respondent Norwich is also a lending institution whose sole involvement in this matter is based upon an August, 1985, agreement to participate in a CNB loan to High Tech Feeds, Inc., which purchased the Rytman Grain Mill. Rytmans subsequently purchased the stock of the grain operation and assumed the CNB loan personally. The Kofkoff respondents were primarily poultry competitors of Rytmans who, on occasion, extended credit to Rytmans during the course of their business relationship. The Brown Jacobson respondents provided legal representation to Rytmans.

In their complaint, Rytmans admit, that in 1987, they defaulted on their financial obligations to CNB. There-

after, a lengthy work-out ensued which culminated in the negotiation of an agreement dated October 31, 1987.

The RICO Complaint and the factual allegations contained therein are virtually identical to the claims made by Rytmans against the same parties in a case commenced in November, 1987 in the Connecticut Superior Court, Judicial District of New London, captioned *The Connecticut National Bank v. Julius Rytman, et al.,* Docket No. CV-87-0505741 S. There, CNB brought an action to foreclose certain mortgages it holds on Rytmans' properties which were executed and delivered by Rytmans to CNB as security for loans. In response to the CNB foreclosure action, Rytmans filed counterclaims against CNB and cross-claims against Brown Jacobson, Kofkoff, and Norwich seeking relief based upon the same facts as presented in the instant RICO case. In the foreclosure case, Rytmans conducted over one hundred (100) days of depositions of defendants and filed extensive interrogatories and document requests to which answers and responses were provided.

In addition, CNB, Norwich, Brown Jacobson and/or Kofkoff have been sued directly, counterclaimed against, cross-claimed against, and/or impleaded by Rytmans in at least eleven (11) additional actions. In said actions, Rytmans allege virtually the identical fact pattern to this case and seek redress for, *inter alia,* breach of contract, negligence, fraud, conspiracy, breach of fiduciary duty, intentional and negligent infliction of emotional distress, and violations of anti-tying and antitrust statutes.

While Norwich filed a separate brief in opposition with the Second Circuit, Norwich now joins in respondents' brief in opposition in the interest of judicial economy.

C. Procedural History

This appeal arises out of the dismissal of Rytmans complaint served November 13, 1991, returnable to the Connecticut Superior Court, Judicial District of New London.

The complaint sought recovery for alleged violations of RICO.

Norwich, on behalf of all respondents, filed a Notice of Removal dated December 11, 1991. Accordingly, this matter was removed to the United States District Court for the District of Connecticut. On December 12, 1991, the District Court entered an Order requiring Rytmans to set forth the information upon which they relied to initiate their RICO action. In response to this Order, on May 11, 1992, Rytmans filed a "RICO Case Statement."

Commencing on May 26, 1992, and dates thereafter, Brown Jacobson, Kofkoff, and CNB, filed separate motions pursuant to Federal Rules of Civil Procedure (hereinafter "Fed. R. Civ. P.") 12(b)(6) to dismiss the claims against them for failure to state a claim upon which relief could be granted, and for Rytmans' failure to plead fraud with the requisite particularity required under Fed. R. Civ. P. 9(b). On June 3, 1992, Norwich moved for Summary Judgment pursuant to Fed. R. Civ. P. 56.

On August 31, 1992, in its *Ruling on Pending Motions*, the District Court ruled that Rytmans failed to state a cause of action under RICO. The District Court, therefore, dismissed the complaint in its entirety against Brown Jacobson, Kofkoff, and CNB. The Court also granted Norwich's Motion for Summary Judgment. On September 9, 1992, the District Court entered Judgment in favor of all respondents in accordance with its *Ruling on Pending Motions*. (Pet. App. 13).

On September 18, 1992, Rytmans moved for Leave to Amend their complaint. On October 8, 1992, Rytmans filed a Notice of Appeal, which Notice was subsequently withdrawn by stipulation dated November 30, 1992. On November 24, 1992, the District Court denied Rytmans' Request for Leave to Amend. Thereafter, on December 4, 1992, Rytmans moved for reconsideration of the District Court's *Ruling on Pending Motions*.

On February 5, 1993, on Rytmans' motion, the District Court reconsidered and denied Rytmans' Request for Leave to Amend their Complaint and to Set Aside and/or Vacate the September 9, 1992 Judgment.

On December 24, 1992, and February 22, 1993, Rytmans filed their second and third Notices of Appeal with the Court of Appeals which were then consolidated in the Second Circuit on March 11, 1993.

On June 14, 1993, the Second Circuit heard oral argument on Rytmans' appeal and on June 21, 1993, entered its decision unanimously affirming the decisions of the District Court.

On July 1, 1993, Rytmans filed their Petition for Rehearing with a suggestion that it be heard En Banc (sic). On August 10, 1993, that petition was denied. On August 11, 1993, Rytmans filed a Motion for Stay of Mandate which was denied by the Second Circuit on September 13, 1993 and issued as a mandate on September 16, 1993. On November 8, 1993, Rytmans filed their Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

This case does not present a conflict with the law in the circuits or with any decisions of this Court. Rather, the District and Second Circuit Courts' decisions challenged by petitioners are in full accord with them. Further, this case does not present an issue of national or special importance.

Pursuant to *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923), the jurisdiction of this Court to review cases by way of certiorari was not conferred merely to give the defeated party another hearing. No type of case is more appropriately applicable to this reasoning than the case at bar. Petitioners merely seek yet another factual review of the District and Second Circuit Courts' decisions. "[A] court of law, such as this Court is, rather

than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949). No such showing has been made. Moreover, this Court has held that: "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). As discussed below, no further review of this case is warranted.

I. WHETHER A CONFLICT EXISTS AS TO THE APPROPRIATE STANDARD OF REVIEW WHEN DETERMINING IF AN AMENDED COMPLAINT SHOULD BE ALLOWED

Petitioners assert that the test, applied by the Second Circuit in determining whether an amended complaint should be allowed, is in conflict with the other circuits. (Pet. 10). No such conflict exists.

As noted above, on August 31, 1992, the District Court dismissed petitioners' November 2, 1991, complaint. Petitioners finally requested Leave to Amend their Complaint on September 18, 1992, which the District Court denied on February 5, 1993.

As this Court stated in *Foman v. Davis,* 371 U.S. 178 (1962), ". . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules," *Id.* at 182, *however,* ". . . the grant or denial of an opportunity to amend is within the discretion of the District Court." *Id.* This Court also held that such reasons as: "futility of amendment"; "undue prejudice to the opposing party"; "repeated failure to cure deficiencies by amendments previously allowed"; and "undue delay" were sufficient reasons to deny leave to amend. *Id.*

In this case, both the District and Second Circuit Courts have followed the holding in *Foman*. The District Court noted that "plaintiffs have failed to demonstrate that leave to amend is warranted under Fed. R. Civ. P. 15(a). The proposed amended complaint merely repeats, at greater length, the legal and factual allegations contained in the initial complaint, and hence fails to remedy the deficiencies prompting judgment for the defendants." (Pet. App. 23). The Second Circuit, after reciting the standard in *Foman*, as well as the standards in *Health-Cem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir. 1990) (no merit in proposed amendments) and *Prezzi v. Schelter*, 469 F.2d 691, 692 (2d Cir. 1972) (per curium), *cert. denied*, 411 U.S. 925 (1973) (successive pleadings remained prolix and intelligible), held that "here, [petitioners] submitted to the Court a proposed amended complaint, consisting of 121 pages (hardly the 'short and plain' or 'simple, concise, and direct' statement that Fed. R. Civ. P. 8(a) and (e) required)", which the District Court reviewed and concluded failed to cure the defects in the original complaint. The Second Circuit held that "[t]his evaluation, and the conclusion that the proposed amendment would not be productive, did not constitute an abuse of discretion." (Pet. App. 7).

Petitioners claim that the Second Circuit's review process is in conflict with other circuits and point to *Gaubert v. Federal Home Loan Bank Board*, 863 F.2d 59, 68 (D.C. Cir. 1988); *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981); and *Nolin v. Douglas County*, 903 F.2d 1546, 1550 (11th Cir. 1990) as authority. (Pet. 13). Their position is unfounded. The *Gaubert*, *Dussouy* and *Nolin* decisions all adhere and in fact cite to this Court's ruling in *Foman* that "the grant or denial of an opportunity to amend is within the discretion of the District Court." *Id.* at 182; *Gaubert* at 69; *Dussouy* at 597; *Nolin* at 1550. Simply put, there is no conflict among the circuits as to the standard of review.

Petitioners reliance on *Vild v. Visconsi,* 956 F.2d 560 (6th Cir. 1992), *cert. denied,* —— U.S. ——, 113 S. Ct. 99 (1993) is misplaced. The District and Second Circuit Courts followed the standard enunciated in *Foman,* which remains controlling.

II. WHETHER THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO A STATE COURT COMPLAINT REMOVED TO FEDERAL COURT

Contrary to petitioners' claims, the Federal Rules of Civil Procedure clearly govern civil actions removed to a district court from a state court. *Willy v. Coastal Corporation,* —— U.S. ——, 112 S. Ct. 1076, 1079, *rehearing denied,* 112 S. Ct. 2001 (1992). Furthermore, contrary to petitioners' convoluted reading of Fed. R. Civ. P. 81(c), seeking to require a district court to treat a removed complaint as "deemed adequate when it enters the federal courts . . ." (Pet. 21), Fed. R. Civ. P. 81(c) should be given its plain meaning. *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120 (1989). Under a plain reading of Fed. R. Civ. P. 81(c), once a complaint is removed to a district court, it then becomes subject to the Federal Rules of Civil Procedure.

Once this action was removed to the District Court, petitioners had the opportunity to replead their case if they so desired. (Fed. R. Civ. P. 81(c)). Instead, petitioners chose to stand on their original complaint despite its deficiencies. (Pet. App. 4). Only after the District Court ruled that Rytmans' complaint failed to state a cause of action under RICO, and judgment had entered (approximately four (4) months after the first motion to dismiss was filed), did Rytmans ever move for Leave to Amend their Complaint. Thereafter, the District Court held that petitioners' Proposed Amended Complaint failed to cure the deficiencies of their original complaint. (Pet. App. 23). Accordingly, the District Court was correct in holding Rytmans' complaint to the standards of the Fed-

eral Rules of Civil Procedure. Fed. R. Civ. P. 1 ("these rules govern the procedure in the United States district courts in all suits of a civil nature . . . .").

III. WHETHER THE SECOND CIRCUIT PROPERLY APPLIED *REVES v. ERNST & YOUNG*

Petitioners claim that there is a "direct conflict between the holding in *Reves v. Ernst & Young*, —— U.S. ——, 113 S. Ct. 1163 (1993) and the Second Circuit's holding in this case." (Pet. 24). No such conflict exists as the Second Circuit, in affirming the District Court's *Ruling on Pending Motions* (Pet. App. 13), did not interpret *Reves* nor did it apply *Reves* to any allegations under 18 U.S.C. 1962(b) as Rytmans claim.

Rytmans also claim that their petition should be granted in order to clarify whether *Reves* applies to § 1962(b) in addition to § 1962(c). However, no such clarification is necessary based upon the facts of this case.

Unlike petitioners' characterization of the Second Circuit's June 21, 1993 decision (Pet. 22), the Second Circuit did not hold that respondents did not engage in unlawful conduct under § 1962(b), rather, the Court simply held that "[p]laintiffs failed to come forward with evidence that could support their assertions of unlawful conduct." (Pet. App. 8-9). In its citation of *Reves*, the Second Circuit was careful to use the abbreviation "*c.f.*" prior to the *Reves* citation. Thus, clearly, the Second Circuit referenced *Reves* for a proposition (§ 1962(c) standards) which differs from the proposition proposed by Rytmans (§ 1962(b) standards) but is sufficiently analogous to lend support to that proposition, and in fact supplied a parenthetical to explain the reference. Accordingly, at no time did the Second Circuit hold that *Reves* applied to cases brought under § 1962(b).

As the Second Circuit did not base any of its decisions on whether *Reves* applies to § 1962(b) issues, no conflict exists between this Court and the Second Circuit.

IV. WHETHER BANKERS ARE EXEMPT FROM RICO

Petitioners are simply wrong when they state that the Second Circuit, in citing *Terry A. Lambert Plumbing, Inc. v. Western Security Bank*, 934 F.2d 976, 981 (8th Cir. 1991), ruled that Congress intended to immunize bankers from § 1962(b) RICO claims. (Pet. 25). Respondents never claimed that bankers were exempt from RICO nor did the Second Circuit hold that bankers are exempt from RICO. Rather, the Second Circuit ruled that Rytmans' "failed to come forward with evidence to support their assertions of unlawful conduct" (Pet. App. 9), and that bankers do not become "racketeers" merely because they perform banking activities. (Pet. App. 8).

In fact, Rytmans have mischaracterized the Second Circuit's decision by failing to include the introductory signal "*see e.g.,*" used by the Court in referencing *Terry A. Lambert Plumbing* which is clearly used for the purpose of indicating an example of a proposition, not as a holding of the court. Rytmans also mischaracterized the Second Circuit's reference to *Reves, see* Section III, *supra.*

V. WHETHER THE SECOND CIRCUIT PROPERLY FOUND THAT THE PETITIONERS FAILED TO ALLEGE THE REQUISITE PREDICATE ACTS UNDER RICO

Petitioners also err in their claim that certiorari should be granted to clarify the extortion claims in this case. (Pet. 27). In its June 21, 1993 decision, the Second Circuit held that "Rytman's allegations do not meet . . ." the elements for a RICO cause of action. (Pet. App. 4). Although petitioners compare their pleading to that of a Virginia plaintiff who properly alleged RICO violations (Pet. 30), they are still faced with the simple fact that both the District and the Second Circuit Courts held that Rytmans' complaint failed to set forth any predicate acts of extortion. (Pet. App. 4).

Rytmans' claim that the Second Circuit's decision of June 21, 1993, conflicts with the case of *Battlefield Builders, Inc. v. Swango,* 743 F.2d 1060 (4th Cir. 1984) does not qualify as a conflict which warrants review by this Court. In *Battlefield,* the Fourth Circuit reversed the District Court, District of Virginia's dismissal of a RICO complaint and held that plaintiff alleged sufficient facts to plead extortion under Virginia law to support a claim under RICO. This holding does not create a conflict between the Second and Fourth Circuit. In both *Battlefield* and this action, the Circuit Courts made fact-specific decisions. In *Battlefield,* the Fourth Circuit held that plaintiff plead a cause of action, while in the case at bar, the Second Circuit held that petitioners failed to plead a cause of action. Therefore, there is no conflict between the two Circuit Courts.

VI. WHETHER THERE IS A NATIONAL DEBATE REGARDING THE THREAT TO ENFORCE LEGAL OR CONTRACTUAL RIGHTS AS THE BASIS FOR HOBBS ACT VIOLATIONS

Petitioners are again misguided in their interpretation of the Second Circuit's decision when they seek to claim that the Second Circuit ruled that any threat to enforce any legal or contractual rights may never be the basis for a Hobbs Act violation.

Instead, the Second Circuit ruled that petitioners here failed to articulate facts which would ". . . suffice to allege extortion within the meaning of the Hobbs Act." (Pet. App. 4). Petitioners merely alleged, *inter alia,* that certain lenders allegedly "threatened to foreclose" (Pet. App. 4) on certain properties and that they "demanded delivery of the collateral in satisfaction of a defaulted loan." (Pet. App. 4). Both the District and the Second Circuit Courts held that these allegations did not meet the required elements for a Hobbs Act violation.

VII. WHETHER ENFORCEMENT OF LEGAL OR CONTRACTUAL RIGHTS CONSTITUTES ACQUISITION OR MAINTENANCE OF AN INTEREST IN, OR CONTROL OF, A BORROWER'S BUSINESS

In determining that petitioners' allegations did not meet the requirements for a RICO cause of action, the Second Circuit specifically ruled that "such actions [do not] constitute acquisition or maintenance of an interest in or control of a borrower's business within the meaning of 18 U.S.C. § 1962(b)." (Pet. App. 5).

While it was clear that petitioners do not agree with the District and/or the Second Circuit Courts' decisions, a further review of the facts is not the function of this Court nor is it warranted here. *Graver Mfg., supra.* As Justice Rehnquist stated for this Court in *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Petitioners merely seek yet another review of the decisions of the courts below because they do not agree with the "correctness" of the fact-specific decisions.

VIII. WHETHER THE SECOND CIRCUIT LIMITED ITS REVIEW OF PETITIONERS CLAIMS

Petitioners claim that the Second Circuit ignored their RICO allegations regarding conduct which spanned a two year period and that the District Court improperly limited its review to a mere nine month period. (Pet. 43). This claim is unsupported. In addition to its numerous general references to petitioners' complaint, the Second Circuit addressed such specific items as Paragraphs 10 (mmmm)(1) and 10(hh)(1) of the complaint. Paragraph 10 covers conduct in the time period between at least 1978 and 1987. Therefore, the Second Circuit clearly did not limit its review as petitioners claim.

Similarly, the District Court did not limit its review of petitioners' complaint. Although, the District Court on several instances referred to events between February, 1987 and November, 1987, it also referred to events well before that time period, *e.g.*, an egg supply agreement (Pet. App. 14) of 1978; an agreement between Colchester Foods (Kofkoff) and Rytmans (Pet. App. 14) of 1986; CNB loans to Rytmans (Pet. App. 14) prior to 1984; and, Norwich's participation in a Rytman/CNB loan (Pet. App. 14) of 1985.

Therefore, petitioners' claim that the courts below improperly limited the scope of their review to a specific time period must fail.

IX. WHETHER THE SECOND CIRCUIT PROPERLY DENIED PETITIONERS' REQUEST FOR ADDITIONAL DISCOVERY PRIOR TO GRANTING SUMMARY JUDGMENT

Petitioners contend that this case presents an "opportunity for the Court to consider the standards to be applied" in a case where a district court denies a motion under Fed. R. Civ. P. 56(f) to permit discovery to respond to a motion for summary judgment. (Pet. 45). However, this contention, as framed, might create a false belief that no such standard exists.

The law is well-established that a party seeking discovery necessary to respond to a motion for summary judgment must specify under oath, pursuant to Fed. R. Civ. P. 56(f):

> (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the [party] has made to obtain them, and (4) why the [party] was unsuccessful in those efforts.

Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy, 891 F.2d 414, 422 (2d Cir. 1989); *Burlington*

Coat Factory Warehouse v. Esprit De Corp., 769 F.2d 919 (2d Cir. 1985).

Petitioners cite no less than fifteen (15) cases for the proposition that "[c]onsideration of a Summary Judgment motion is proper only after there has been adequate time for discovery" (Pet. 45), a position with which Norwich agrees. However, the issue here is not the standard to be applied, but whether the District Court, as affirmed by the Second Circuit, correctly applied Fed. R. Civ. P. 56(f) and the case law decided thereunder.

In their Rule 56(f) motion to the District Court, petitioners contended that they could not respond to Norwich's Motion for Summary Judgment without conducting additional depositions. Norwich's Motion for Summary Judgment was based on the contention that petitioners had absolutely no evidence to support any claim against Norwich. At the time of that motion, discovery had "already been conducted over a span of years in the state court proceedings involving those parties." (Pet. App. 7). In fact, over one hundred (100) days of depositions of the respondents had been conducted by petitioners in the more than five (5) years that the State Court actions (with virtually identical fact patterns as alleged in the instant action) had been pending.

Therefore, the District Court was well within its discretion to deny the requested extension of time, and the Second Circuit was well within its discretion to affirm that decision. The cases cited by petitioners lend no support to their claims that they should have been allowed to conduct additional discovery, as those cases are factually distinguishable from the case at bar.

The Second Circuit relying on *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131-32 (2d Cir. 1993), and *Billard v. Rockwell International Corp.*, 683 F.2d 51, 57 (2d Cir. 1982), properly held that the District Court was not required to grant petitioners any additional discovery when petitioners had already had great access to dis-

covery in related cases over a period of years. (Pet. App. 7-8).

CONCLUSION

For all of the above stated reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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